

REMARKS

In the December 19, 2005 Office Action, the Examiner *provisionally* rejected pending claims 1-20 on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-20 of co-pending Application Serial No. 10/810,112, which was filed on the same day as the present application. Applicants respectfully traverse the provisional rejection and request that pending claims 1-20 be allowed for the reasons set forth herein.

In this case, the only basis for rejecting the claims is the provisional double patenting rejection. The applicable patent examination guidelines indicate that, if a "provisional" nonstatutory obviousness-type double patenting rejection is the only rejection remaining in a pending application, the examiner should withdraw that rejection and permit the pending application to issue as a patent without a terminal disclaimer. See, MPEP, Section 804(I)(B)(1) (8th ed. Rev. 4, Oct. 2005) ("If 'provisional' [nonstatutory obviousness-type double patenting] ODP rejections in two applications are the only rejections remaining in those applications, the examiner should withdraw the ODP rejection in the earlier filed application thereby permitting that application to issue without need of a terminal disclaimer. A terminal disclaimer must be required in the later-filed application before the ODP rejection can be withdrawn and the application permitted to issue. If both applications are filed on the same day, the examiner should determine which application claims the base invention and which application claims the improvement (added limitations). The ODP rejection in the base application can be withdrawn without a terminal disclaimer, while the ODP rejection in the improvement application cannot be withdrawn without a terminal disclaimer.") (emphasis added).

Pursuant to the enumerated guidelines, Applicants respectfully request that the examiner withdraw the provisional rejection and permit this application to issue without need of a terminal disclaimer, or in the alternative provide an indication of "which application claims the base invention and which application claims the improvement (added limitations)" so that Applicants can formulate an additional response. Based on the present record, Applicants respectfully submit that the claims of the pending application are patentably distinct from the claims of co-pending Application Serial No. 10/810,112 so that neither application should be considered a "base invention" on which the other application is merely an improvement with additional limitations. However, even if the two applications did claim patentably indistinct subject matter (which they do not), the policy behind the nonstatutory double patenting rejections (namely,

preventing prolongation of the patent term) does not appear to apply to the current situation where both applications were filed on the same day and therefore would have the same patent term.

In view of the remarks set forth herein, Applicants respectfully submit that all pending claims are in condition for allowance. Accordingly, Applicants request that the provisional rejection of claims 1-20 be withdrawn and that a Notice of Allowance be issued. Nonetheless, should any issues remain that might be subject to resolution through a telephone interview, the Examiner is requested to telephone the undersigned at 512-338-9100.

I hereby certify that this correspondence is being transmitted to the USPTO via facsimile on March 13, 2006.

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Respectfully submitted,

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